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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966

No. 966

UNITED STEELWORKERS OF AMERICA, AFL-CIO, and Its LOCAL UNION 2958, *Petitioners,*

v.

UNITED STATES OF AMERICA

and

UNION CARBIDE CORPORATION, *Respondents.*

## BRIEF OF RESPONDENT UNION CARBIDE CORPORATION OPPOSING PETITION FOR WRIT OF CERTIORARI

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## TABLE OF CONTENTS


| | Page |
|---|---|
| Question Presented | 3 |
| Counterstatement of the Case | 3 |
| Argument | 6 |
| 1. Use of the Customer Industry Rather Than the Struck Industry and the Application of the Act to a Strike at a Single Plant | 7 |
| 2. The Existence of a Military Aircraft Engine Industry | 12 |
| 3. The Strike Affects a Substantial Part of the Military Aircraft Engine Industry | 14 |
| Conclusion | 17 |


## TABLE OF CITATIONS


CASES:

Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271 ..... 14
Steelworkers v. United States, 361 U.S. 39 .....2, 6, 7, 17
United States v. United Steelworkers Union (American Locomotive Co.), 202 F. 2d 132 (2d Cir. 1953), cert. den., 344 U.S. 915 .....7, 8, 9, 11, 12

LEGISLATIVE MATERIALS:

Hearings Before the Subcommittee on Labor and Labor-Management Relations of the Senate Committee on Labor and Public Welfare, 82d Cong., 2d Sess., on National Emergency Disputes Act .....10, 11
93 Cong. Rec. 6679 (Remarks of Senator Pepper) ... 10

MISCELLANEOUS:

Daily Labor Report (Bureau of National Affairs) No. 6 (Jan. 10, 1967), p. B-1 ..... 16

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Respondent Union Carbide, the employer, opposes the petition for a writ of certiorari. Union Carbide was a defendant in the injunction proceeding in the District Court and is bound by the injunction issued by that Court and affirmed by the judgment of the Court of Appeals. Union Carbide did not oppose or appeal the issuance of the injunction. The order en-

joins the Union from continuing the strike and orders both parties to continue good faith negotiations in an effort to resolve the dispute. Union Carbide asserts no private interest in continuing the injunction, but does believe that the public interest would not be served by setting aside the order of the court below.

The injunction was issued upon the finding of the District Court and the Court of Appeals that the strike at the Kokomo, Indiana, plant of Union Carbide affected a substantial part of an industry and imperiled the national safety. These are the statutory standards as defined by this Court in *Steelworkers* v. *United States,* 361 U.S. 39, for the invocation of the national emergency provisions of the law. Petitioners do not claim that these standards were not applied, but rather that one of them was applied incorrectly. It is conceded that the strike imperils the national safety. But it is claimed there is a lack of evidence to show that a substantial part of an industry was affected by the strike.

This does not present a question for certiorari under the standards of review established by this Court. The Court has repeatedly said that it does not sit as an appellate court to correct alleged factual errors made by the lower court. This is the function of the Court of Appeals, and that Court has in a unanimous opinion affirmed the critical findings of the District Court. The two courts below have concurred in finding, in agreement with the President, that the strike imperiled the national safety and affected a substantial part of the military aircraft engine industry. No grounds have been stated for the issuance of a writ of certiorari to review those essentially factual findings.

The lifting of the injunction at this stage and the resumption of the strike would, beyond question, recreate in an aggravated form the admitted danger to the national safety arising from the cessation of the production of critical defense materials at the Kokomo plant.

## QUESTION PRESENTED

Whether there are "special and important reasons" for this Court to review a judgment of a Court of Appeals upholding findings of a District Court, pursuant to Sections 206-210 of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. §§ 176-180, that the strike at the Stellite Division of the Union Carbide Corporation, Kokomo, Indiana, if permitted to continue, would affect a substantial part of the military aircraft engine industry and imperil the national safety.

## COUNTERSTATEMENT OF THE CASE[1]

On September 29, 1966, the Union struck the Kokomo plant of the Union Carbide Corporation, together with ten other plants of the same company. The Kokomo plant employs some 2,100 employees.

The Kokomo plant is the major producer of a certain high temperature special purpose metal alloy (Hastalloy X),[2] which is used to fabricate combustion liners in connection with engines for certain jet aircraft cur-

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[1] Respondent Union Carbide Corporation concurs in all respects with the factual presentation made by the government through its verified affidavits.

[2] The only other producer of Hastalloy X is a licensee of the Union Carbide Corporation, Universal Cyclops Company. That company has informed the government that delivery of the alloy could not be made until the latter part of 1967 (Goldsworthy affidavit, para. 3).

rently being used in combat operations in Southeast Asia, as well as other places. (Vance affidavit, paras. 4 and 5). The aircraft engines in question are manufactured solely by the General Electric Company (Vance affidavit, para. 4). The alloy produced by the Kokomo plant is essential to enable the engine to perform under the extremely high temperatures generated by the burning of jet fuel. (Vance affidavit, para. 5).

Without the injunction, existing supplies of the alloy would have been completely exhausted by December 30, 1966, and it is estimated that it would take five weeks after the resumption of production at the struck plant before the alloy could be produced and supplied to the manufacturer of the jet engines. (Vance affidavit, para. 5, and Goldsworthy affidavit, para. 3).

The record further shows that should another company be licensed to produce Hastalloy X, there would be at least a nine-month delay in obtaining production from such new source. (Goldsworthy affidavit, para. 4).

Moreover, even though there are other alloys that may have essentially the same properties as Hastalloy X, these other alloys could not be used in the cumbustion liners for these jet aircraft engines until an extensive and time-consuming testing procedure had been completed, taking at least ten months (Goldsworthy affidavit, para. 5).

The Kokomo plant produces turbine blade castings which are later machined and supplied to the General Electric Company for use in connection with the production of engines and spare parts for helicopters being used in the conflict in Southeast Asia. The Gen-

eral Electric Company is the sole producer of engines and spare parts for these helicopters. There is no alternate source from which General Electric can obtain a sufficient number of such castings in time to meet its requirements for scheduled engine production (Vance affidavit, para. 6).

The Kokomo plant also produces certain first and second stage turbine blades and vanes which are sold to the Lycoming Division of AVCO Corporation. Lycoming is the sole producer of engines and spare parts for two classifications of helicopters being used in the Southeast Asia conflict. No other production source can meet this requirement for blades and vanes.

The District Court made detailed findings of fact based on the evidence adduced through the verified affidavits, finding that the strike if permitted to continue would affect a substantial part of the military aircraft engine industry and would adversely affect the national safety (Finding nos. 9 and 10). Concluding that the statutory criteria for obtaining relief under Sections 206 through 210 of the Labor-Management Relations Act of 1947, as amended, had been thus fulfilled, the Court issued a preliminary injunction, customary in form to injunctions issued pursuant to these statutory provisions in other cases.

The Court of Appeals found nothing in the record to disturb the findings made by the District Court, and after disposing of the various arguments put forward by petitioners, affirmed the judgment of the District Court, *per curiam* (Judges Fahy, McGowan and Leventhal).

## ARGUMENT

### There Are No "Special and Important Reasons" for This Court To Review on a Writ of Certiorari the Findings Based on the Evidence Adduced That the Strike Involved in This Case Met the Statutory Conditions of Breadth of Involvement and Peril to the National Health and Safety.

This Court's rule respecting the considerations governing review on certiorari makes it amply clear that review will be granted only where there are "special and important reasons therefor" (Rule 19). The petitioners assert that the present case involves the decision of "an important question of federal law which has not been, but should be, settled by this Court." The decision of the Court of Appeals, however, involves merely the question of whether there was sufficient evidence to support the District Court's finding that the strike affected a substantial part of an industry in commerce.[8] The Court of Appeals had no difficulty in finding substantial evidence to support the District Court's finding. The question presented was essentially one of fact and hinged on the determination that the strike affected a substantial part of the military aircraft engine industry. The resolution of that question does not involve an important question of federal law, nor are any other special or important reasons assigned by the union petitioners for the granting of the writ.

This Court dealt definitively with the "national emergency" provisions of the Taft-Hartley law in 1959 in *Steelworkers* v. *United States,* 361 U.S. 39.

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[8] The union petitioners made no effort in the courts below to challenge the evidence that the strike imperiled the national health or safety.

There the Court clearly defined the role of the judiciary in such disputes, holding:

> "The statute imposes upon the Court the duty of finding, upon evidence adduced, whether a strike or lockout meets the statutory conditions of breadth of involvement and peril to the national health and safety." 361 U.S. at 41.

The rulings of the courts below were made with manifest fidelity to the statutory standards as they were construed by the Court in the *Steelworkers* case. Petitioners argue only that these standards were misapplied on the facts of this case. This presents at most a question of substantiality of the evidence, which is a question that this Court has traditionally left for the courts below to decide.

Since the petitioners have addressed their brief to the merits, brief comments will be directed at their arguments.

**1. Use of the Customer Industry Rather Than the Struck Industry and the Application of the Act to a Strike at a Single Plant.**

The first argument of the petitioners is that the government is limited by the Act to the industry in which the strike is taking place in determining whether a substantial part of "an industry" is affected, and that the government is prohibited from looking to the "customer industry" (the industry purchasing the struck product) as the standard. Coupled with this argument, the petitioners contend that the Act was not intended to apply to a strike at a single plant.

Both of these contentions were made fourteen years ago by the Steelworkers Union in *United States* v. *United Steelworkers Union (American Locomotive*

*Co.)*, 202 F. 2d 132 (2d Cir. 1953), *cert. den.*, 344 U.S. 915. In the *American Locomotive* case, the union struck the Dunkirk, New York, plant of the Company which produced "heat exchanger shells used in the production of heavy water needed to operate nuclear reactors," and sold this product to prime contractors of the AEC who were constructing facilities needed to produce atomic bombs. The struck company was in an industry known as the "heat exchanger, pressure vessel and prefabricated pipe industry," which the Court found was not affected in substantial part by the strike. The Court, however, found that the strike affected a substantial part of the customer's industry—the atomic weapon industry, and that this sufficed for the purposes of the statute.

The courts below adopted the same view of the statute, and there is no contrary authority. The interpretation appears eminently sound. The statute refers in explicit terms to the industry "affected", not the industry in which the strike occurs. In this case, as in *American Locomotive,* the strike directly affected the so-called "customer" industry. The effect was not remote, indirect or speculative, but direct, immediate and critical.

In *American Locomotive,* the Court also dealt with the contention that the emergency provisions were not intended to apply where a single plant was involved. On this point, the Court held:

> "The obvious purpose of the instant statute was to provide some means for protecting the national health and safety when that was imperiled by a strike or a lock-out which burdened or obstructed commerce or the production of goods for commerce in an entire industry or substantial part of an industry. Had Congress meant to confine the application of this statute to situations result-

> ing from industry-wide strikes it is reasonable to suppose that it would have used language better adapted to that end. By using 'affects' instead of some more confining word as regards the strike or lock-out which might be enjoined it made, we think, the test of applicability not merely the extent of the strike within an industry but the extent of the effect of a strike upon an industry and the national health or safety." 202 F. 2d at 137.

Petitioners' arguments have thus been considered and categorically rejected by the Second Circuit some fourteen years ago. The intervening Congresses spanning this period have not sought by legislation to overrule this interpretation of the law.

Petitioners' attempt at this late stage to marshall legislative history in support of its contention discloses nothing that is definitive. The pre-Taft-Hartley history cited by petitioners is quite inconclusive and produces no clarification of the statutory text. Moreover, it largely antedates the final conference report dated June 3, 1947, in which the proposed national emergency strike provisions were changed from applying only where an entire industry was affected to where an entire industry "or a substantial part thereof" was affected. Thus, the legislative history on the point prior to the conference report naturally focuses around industry-wide or national strikes.

After the conference report, the legislative history clearly shows an awareness by Congress of the fact that the application of the national emergency provisions had been substantially broadened by the addition of the words "or a substantial part thereof." The remarks of Senator Pepper quoted in petitioners' brief (p. 27) show this awareness, and the continuation of

his remarks points up even more graphically the change wrought in the conference report:

> "But here, again, the conference report is not satisfied with protecting against a strike in a case where an entire industry is affected, but the conference report contains the words 'or a substantial part thereof'. Who will determine that question, Mr. President? It would not have to be a strike in the entire automobile industry, but it could be a strike against only one of the large manufacturers. A strike affecting any substantial part of such an industry, as construed by the Board or court, would be sufficient to permit application of this drastic provision for government procedure by injunction, thus again making it a little easier to evade the provisions of the Norris-LaGuardia Act and to obtain injunctions against workers. . ." 93 Cong. Rec. 6679, 2 Leg. His. 1598 (June 6, 1947).

The after-the-fact legislative discussions sought to be utilized by the petitioners suffer even graver infirmities. The fact is that the dialogue quoted by petitioners related to the plant seizure bill (S. 2999, 82nd Cong., 2d Sess., 1952), which was defeated in Congress. Petitioners have quoted excerpts from the hearings and the Senate Report favoring passage of the legislation, ignoring the opponents' arguments which obviously carried the day. The hearings on the bill were characterized by a running argument between the proponents of the bill, who claimed that the Taft-Hartley provisions for handling emergency strikes were inadequate, and the opponents of the bill who claimed they were adequate.[4] Under these conditions,

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[4] Hearings before the Subcommittee on Labor and Labor-Management Relations of the Senate Committee on Labor and Public Welfare, 82nd Cong., 2d Sess., on the National Emergency Labor Disputes Act (S. 2999) (1959), pp. 268, 271, 425, 674, 706.

anything that was said must be taken with a grain of salt. At any rate, the issue was settled in favor of the bill's opponents who challenged the specific argument that the language of the Taft-Hartley Act could not apply to a strike in a relatively small but vital defense plant.[5] Properly assessed, the post-legislative history may be damaging to petitioners' argument. It may just as well be taken to reflect the judgment of Congress that the national emergency provisions of Taft-Hartley were adequate to cover the situation, as found shortly thereafter by the Court of Appeals in *American Locomotive*.

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[5] "*Senator Humphrey:* What do you think about the Taft-Hartley law rather specific provisions? It says that it affects a whole industry or a substantial portion thereof . . .

* * * * *

"It is the same old case that I go back to again. Here is somebody who makes a little resistor, let us say, for a part of electrical equipment that is needed in a particular gadget or particular defense material.

"*Mr. Alfino* (Assistant Manager, Labor Relations, Chamber of Commerce of the United States): The essential test is: Do we have a national emergency?

"Once we apply the test and the answer comes out 'yes', then we apply the Taft-Hartley law. That is what was intended.

"*Senator Humphrey:* The test in the Taft-Hartley law is different.

"*Mr. Barton* (Manager, Labor Relations, Chamber of Commerce of the United States): The statute says 'affecting an entire industry or substantial part thereof.' As to the incident you cite, where some little gadget is vital to some larger item, I do not think we can say for sure that that would not be something affecting a substantial part of an entire industry. Maybe it would." Hearings before the Subcommittee on Labor Relations, of the Senate Committee on Labor and Public Welfare, 82nd Cong., 2d Sess., on the National Emergency Labor Disputes Act (S. 2999) (1952), p. 719.

Petitioners' argument on legislative history was also answered by the Court in *American Locomotive*. There, the Court said:

> "Reliance is put upon what is urged to be adequate legislative history to show that Congress intended the injunctive provisions of §208 to apply only to strikes of a substantially industry-wide scope and not to those of a local character such as this one. Such history does show that the danger to the national health or safety resulting from industry-wide strikes was one of the things which led to the passage of the Act, but it is by no means clear that it was the intention of Congress to limit its scope to such a situation. We find no report of a legislative committee in charge of legislation which finally emerged as the [Act] which so interpreted it; and, though some members of Congress may have indicated that their primary concern was with the evils flowing from industry-wide strikes, we do not find legislative history which warrants attributing to Congress an intention to make that the sole basis for reviving to some extent the jurisdiction which the district courts had in labor disputes before the effective date of the Norris-LaGuardia Act, 29 U.S.C.A. §§ 101-115." 202 F. 2d at 137.

In applying the substantial part of an industry standard, the lower courts, as petitioners' review of the twenty-six cases shows, have uniformly followed the *American Locomotive* opinion.

**2. The Existence of a Military Aircraft Engine Industry.**

Petitioners question the existence of a military aircraft engine industry and would substitute a different and somewhat larger industry known as the "aircraft engine and parts" industry, which would include both military and commercial production. The statute sets no guide as to what constitutes an industry. It clearly

does not, as petitioners appear to argue, adopt the classification of industries designated in the Standard Industrial Classification system.[6] The statute, on the contrary, by its general phraseology, gives wide latitude to the determination of the confines of the industry affected by an emergency-creating strike. There is no justification for the mechanical adoption of any single and rigid classification system for determining, as the emergency arises, the identity of the industry affected by the strike. In an interrelated and complex productive system, this would lead to incongruous results.

The President, the District Court and the Court of Appeals concurred in their finding that there exists an identifiable military aircraft engine industry. As the Court of Appeals found, this aspect of the inquiry presented "only minimal difficulties," stating:

> "That there is in this country a tangible commitment of extensive resources of capital, technological skill, and manpower to the building of aircraft engines designed for use in military aircraft is evident from this record, especially when read with the common sense that should inform the judicial process as any other. The President, in using this term, was not devising an imaginary construct, nor was the District Court." (Slip Opinion, pp. 5-6).[7]

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[6] A system of classifying groups and subgroups in industries devised by the Office of Statistical Standards of the Bureau of the Budget.

[7] The Court called attention (Slip Opinion, pp. 5-6, fn. 1) that the petitioners' own affidavits make comparison in percentages between production of engines for civilian use and production for military use, and that the affidavits state that the strike may affect as many as thirteen per cent of the total employees in the combined military and aviation aircraft engine industries. As the Court said:

> "These figures impress us as supporting a discernable difference between military and civilian production."

### 3. The Strike Affects a Substantial Part of the Military Aircraft Engine Industry.

Petitioners' last point is that there was "a total failure of proof" to establish that the strike affected a substantial part of the military aircraft engine industry (Pet. Br., p. 33). The mere statement of the proposition discloses it as the type of issue this Court has said on countless occasions is not open to review by writ of certiorari.[8] Nevertheless, the petitioners are wrong in the evidentiary point they raise.

Petitioners assume that the emergency strike provisions of the Act contain some kind of rigid quantitative measure for judging whether the strike affects a substantial portion of an industry. But there is nothing in the legislative history to warrant this mechanistic interpretation. A substantial portion of an industry need not be read to mean the greater part of the industry, half of the industry, one-third of the industry, or any fixed percentage of the whole. The use of the term "substantial" rules out an effect which might be *de minimis,* but it encompasses any impact which is tangible, significant and real.

The very fact that the impact of the strike on the military aircraft engine industry has been to create serious production shortages of critical materials which impair the national military effort in Southeast Asia affords a demonstration that the effect of the strike is

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[8] As stated in *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275:

> "A court of law, such as this court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."

not illusory but substantial enough to imperil military capability in a vital combat area. When judged against the national defense requirements for military aircraft engines, the effect is substantial indeed.

The fact is that the record shows that the Kokomo plant is the major producer of certain alloys, castings, turbine blades and vanes essential to the production of certain of the most advanced types of aircraft engines and helicopters used in Southeast Asia, and that these materials cannot be obtained anywhere else in time to meet current critical needs. The production of these materials is essential to the continued supply of these vital aircraft. Under these circumstances, the substantiality of the effect of the strike on the military aircraft industry is plainly established.

Before directing the Attorney General to invoke the emergency procedures, the President found that the strike affected a "substantial part of the military aircraft engine industry." (Executive Order No. 11,321, Exhibit B to the Government's complaint). Based upon affidavits filed with the Court, the District Court made an explicit finding that the "strike, if permitted to continue, will affect a substantial part of the military aircraft engine industry." (Findings of Fact and Conclusions of Law of the District Court, Finding No. 9). The Court of Appeals, after argument, affirmed the finding.

These findings were not based on opinion or on speculation or guesswork. They were based on the evidence presented. As the Court of Appeals said, in part:

> "The District Court did not have to find that the 'entire' military aircraft engine industry was affected, but only that a significant segment of it

> was. * * * [I]t is impossible to read what is in this record of the types and functions of the aircraft involved without concluding that their availability in adequate numbers to every branch of the armed services rests upon a resource commitment of a very substantial nature indeed." (Slip Opinion pp. 6-7.)

Petitioners' attack on the Court of Appeals' finding is semantical, attempting to draw a fine distinction between the Court's phrase "substantial commitment of resources", and the statutory text, "substantial part" of an entire industry. (Pet. Br. 35). The Court's opinion, without question, expressly treats with and affirms on the basis of the record the explicit finding of the District Court that the strike affected a substantial part of the military aircraft engine industry.

The emergency strike provisions were enacted almost twenty years ago, and, as petitioners state, the procedures have been invoked a total of twenty-six times. During that period there have been thousands of strikes, many of them affecting an entire industry or significant segments. Many of these strikes have caused extreme public inconvenience. The fact that the emergency procedures have been utilized in only twenty-six strikes should allay any union fears that there has been or will be any overreaching by the government in the invocation of these procedures.[9]

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[9] In 1966, according to a recent release of the United States Department of Labor (Bureau of Labor Statistics), there were 4,200 strikes, 28 of which involved 10,000 or more workers. (Bureau of National Affairs, Daily Labor Report, No. 6, January 10, 1967).

## CONCLUSION

The petitioners are seeking in this case to import highly artificial restrictions into the statutory requirement that the strike in question affect a substantial portion of an industry, in the same manner as the petitioner in *United Steelworkers* v. *United States, supra,* attempted, without success, to restrict artificially the concurrent statutory criterion of peril to the national health or safety. There the union argued that while the entire steel industry was affected, only a small percentage of the productive capacity of the industry was committed to the production of items critical to the national safety, and, therefore, that there should be a selective rather than blanket application of the statute limited in scope to meet the national need and imposing the least restraint on the right to strike. That, in effect, is what the Government has done here. There were eleven Union Carbide plants on strike, but the injunction is limited to the plant whose production is essential to military needs.

In sustaining the ability of the Government to meet national emergencies through the injunctive provisions of the Act, this Court noted in the *Steelworkers* case that "the statute was designed to provide a public remedy in times of emergency" (361 U.S. at 43). And, the concurring opinion of Mr. Justice Frankfurter clearly saw that the "evidentiary burdens" which the petitioner sought to place on the Government "would tend to cripple the designed effectiveness of the Act" (361 U.S. at 52). Based on these considerations, this Court set the bounds of judicial involvement at "finding, upon the evidence adduced, whether a strike or lockout meets the statutory conditions of breadth of in-

volvement and peril to the national health and safety" (361 U.S. at 41).

The courts below have discharged this function. The petitioners now quarrel with the courts' application of the evidence to the statutory criteria. As shown above, the application was reasonable and the lower courts' conclusions were based on evidence adduced. This issue is not one warranting the grant of a writ.

Respectfully submitted,

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